

Lawrence, *Viscount Say and Seal*, - - - *Appellant.*

The Lady Catherine Jones, Dame Frances Hewett, Peter Hawker, Esq; Thomas-William Burman, Fiennes Twisleton, Esq; Nathan Izod, William Clark, William White, and the Lord Viscount Harcourt; } *Respondents.*

The CASE of the Respondents,

The Lady Catherine Jones, Dame Frances Hewett, Peter Hawker, Esq; and Thomas-William Burman.

TH E Honourable *Frances Ellise*, Widow, deceased, one of the Daughters and Coheirs of *James, Viscount Say and Seal*, deceased, being seized in Fee of, and in one undivided Moiety of several Messuages, Lands, Tenements, and Hereditaments in *Neather Norton*, and *Oversbury Norton*, in the County of *Glocester*; duly made and executed her last Will and Testament in Writing, dated the 10th Day of *December*, 1685; and did thereby give and bequeath divers small Legacies to divers Persons in her Will named; after which she gave and devised the said Lands and Hereditaments, in the Words following. “*Item*, I give and devise all my Manors, Messuages, Lands, Tenements, and Hereditaments whatsoever, with their and every of their Appurtenances in *Neather Norton* and *Oversbury Norton*, or elsewhere, in the County of *Glocester*; and also all my Messuages, Lands, Tenements, and Hereditaments in Possession, Reversion, Remainder, or otherwise, lying in *Mortlack*, or elsewhere, in the County of *Surry*, to *Thomas Erle* of *Churborough* in the County of *Dorset*, Esq; and to *Charles Morgan* of the *Inner Temple*, *London*, Esq; and to their Heirs and Assigns for ever, upon Trust and Confidence. Nevertheless, and to the Intent and Purpose, but not upon Condition, that they the said *Thomas Erle*, and *Charles Morgan*, and the Survivor of them, and the Heirs of such Survivor, shall, and will, in the first Place, out of the Rents, Issues, and Profits of the said Manors, Messuages, Lands, and Premises in *Neather Norton* and *Oversbury Norton* aforesaid, pay, and satisfy the several Legacies, Devises, and Bequests, hereafter mentioned to be by me given, devised, or bequeathed.”

THESE Words are followed by a Devise of some Annuities for Lives, and some pecuniary Legacies; after which are the following Words (*viz.*) “And I do hereby authorise and appoint, that they the said *Thomas Erle*, and *Charles Morgan*, and their Heirs, shall, and will, in the first Place, reimburse, and pay him, and themselves, all such necessary Charges, and Disbursements, as they shall from Time to Time be put unto, concerning all, or any of the Matters herein contained. And from, and after their Reimbursement and Payment of the said several Annuities, or Rent Charges, Legacies, and Interest aforesaid, to be paid out of *Neather Norton* and *Oversbury Norton* aforesaid; and as the same shall severally and respectively be paid, end, and determine: That then they the said *Thomas Erle*, and *Charles Morgan*, and their Heirs, shall and will pay, or cause to be paid, all the rest, and residue of the Rents, Issues, and Profits of the said Manors, Messuages, Lands, and Premises to the proper Hand of the said *Cecill Fiennes*, or to such Person and Persons as she shall, by any Writing under her Hand and Seal, direct and appoint, for and during the Term of her natural Life; and from and after her Decease, they the said *Thomas Erle*, and *Charles Morgan*, and their Heirs, shall stand, and be seiz'd of, and in all and every the said Manors, Messuages, Lands, and Premises, to the Use and Behoof of the Heirs of the Body of my said Daughter *Cecill Fiennes*, severally and successively, as they shall happen to be in Priority of Birth, and Seniority of Age; and to the Heirs of their several and respective Bodies in Tail general, subject nevertheless to the Payment of the said Annuities, Legacies, and Interest charged, and hereby before by me given out of *Neather Norton* and *Oversbury Norton* aforesaid: And for Default of such Issue, then upon this further Trust and Confidence. And I do hereby declare my Mind and Will to be, That they the said *Thomas Erle* and *Charles Morgan*, and their Heirs, shall stand, and be seiz'd of, and in the said Manors, Messuages, Lands, and Premises in *Neather Norton* and *Oversbury Norton* aforesaid; to this further Use, Intent, and Purpose, That from, and after the Decease of my said Daughter *Cecill Fiennes*, without Issue of her Body aforesaid, that over, and besides the Payment of the said former Legacies, and Charges by me hereby given, and devised out of *Neather Norton* and *Oversbury Norton* aforesaid, they the said *Thomas Erle* and *Charles Morgan*, and their Heirs, shall, and will, out of the Rents, Issues, and Profits of the said Manors, Messuages, Lands, and Premises, pay and satisfy the several Gifts, Legacies, and Bequests hereafter mention'd; (that is to say) I give and devise to the said Mr. *Francis Twisleton*, my Godson, and Son to *George Twisleton* of *Yorkshire*, the Sum of Twenty Pounds per Annum, for and during the Term of his natural Life; and after his Decease, I give and devise the said Sum of Twenty Pounds per Annum, to Mr. *Fiennes Twisleton*, for and during the Term of his natural Life. *Item*, I give and devise the Sum of Twenty Pounds per Annum, for ever, to be issuing and going out of my said Manors, Messuages, Lands, and Premises, in *Neather Norton* and *Oversbury Norton* aforesaid, to be equally distributed yearly, and every Year for ever, to, and amongst four poor Widows of the said Parish of *Neather Norton* and *Oversbury Norton*, at the Discretion and Nomination of my said Trustees, their Heirs and Assigns. And from, and after, the Decease of my said Daughter *Cecill Fiennes*, without Issue, as aforesaid, I give and devise the said Manors, Messuages, Lands, and Premises, with their, and every of their Appurtenances, to the said Lady *Catherine Jones*, Daughter to the Right Honourable the Earl of *Ra- lagh*, in the Kingdom of *Ireland*; Mrs. *Frances Bettenson*, of *Scadbury*, in the County of *Kent*, my said God-daughter; the said *Francis Twisleton*, of the Parish of *Saint James*, in the County of *Middlesex*, Gentleman; and to the said *Elizabeth Hughes*, of *Fewes*, in the County of *Somerset*, severally, and respectively, and to their several and respective Heirs of their respective Bodies, lawfully begotten, or to be



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The CASE of the Respondents,

The Lady Catherine Jones, Dame Frances Hewett, Peter Hawker, Esq; and Thomas-William Burman.

The Will of Frances Ellise, dated the 10th of December, 1685.

THE Honourable *Frances Ellise*, Widow, deceased, one of the Daughters and Coheirs of *James, Viscount Say and Seal*, deceased, being seized in Fee of, and in one undivided Moiety of several Messuages, Lands, Tenements, and Hereditaments in *Neather Norton*, and *Oversbury Norton*, in the County of *Glocester*; duly made and executed her last Will and Testament in Writing, dated the 10th Day of *December*, 1685; and did thereby give and bequeath divers small Legacies to divers Persons in her Will named; after which she gave and devised the said Lands and Hereditaments, in the Words following. “*Item*, I give and devise all my Manors, Messuages, Lands, Tenements, and Hereditaments whatsoever, with their and every of their Appurtenances in *Neather Norton* and *Oversbury Norton*, or elsewhere, in the County of *Glocester*; and also all my Messuages, Lands, Tenements, and Hereditaments in Possession, Reversion, Remainder, or otherwise, lying in *Mortlack*, or elsewhere, in the County of *Surry*, to *Thomas Erle* of *Charborough* in the County of *Dorset*, Esq; and to *Charles Morgan* of the *Inner Temple*, *London*, Esq; and to their Heirs and Assigns for ever, upon Trust and Confidence. Nevertheless, and to the Intent and Purpose, but not upon Condition, that they the said *Thomas Erle*, and *Charles Morgan*, and the Survivor of them, and the Heirs of such Survivor, shall, and will, in the first Place, out of the Rents, Issues, and Profits of the said Manors, Messuages, Lands, and Premises in *Neather Norton* and *Oversbury Norton* aforesaid, pay, and satisfy the several Legacies, Devises, and Bequests, hereafter mentioned to be by me given, devised, or bequeathed.”

THESE Words are followed by a Devise of some Annuities for Lives, and some pecuniary Legacies; after which are the following Words (*viz.*) “And I do hereby authorise and appoint, that they the said *Thomas Erle*, and *Charles Morgan*, and their Heirs, shall, and will, in the first Place, reimburse, and pay him, and themselves, all such necessary Charges, and Disbursements, as they shall from Time to Time be put unto, concerning all, or any of the Matters herein contained. And from, and after their Reimbursement and Payment of the said several Annuities, or Rent Charges, Legacies, and Interest aforesaid, to be paid out of *Neather Norton* and *Oversbury Norton* aforesaid; and as the same shall severally and respectively be paid, end, and determine: That then they the said *Thomas Erle*, and *Charles Morgan*, and their Heirs, shall and will pay, or cause to be paid, all the rest, and residue of the Rents, Issues, and Profits of the said Manors, Messuages, Lands, and Premises to the proper Hand of the said *Cecill Fiennes*, or to such Person and Persons as she shall, by any Writing under her Hand and Seal, direct and appoint, for and during the Term of her natural Life; and from and after her Decease, they the said *Thomas Erle*, and *Charles Morgan*, and their Heirs, shall stand, and be seized of, and in all and every the said Manors, Messuages, Lands, and Premises, to the Use and Behoof of the Heirs of the Body of my said Daughter *Cecill Fiennes*, severally and successively, as they shall happen to be in Priority of Birth, and Seniority of Age; and to the Heirs of their several and respective Bodies in Tail general, subject nevertheless to the Payment of the said Annuities, Legacies, and Interest charged, and hereby before by me given out of *Neather Norton* and *Oversbury Norton* aforesaid: And for Default of such Issue, then upon this further Trust and Confidence. And I do hereby declare my Mind and Will to be, That they the said *Thomas Erle* and *Charles Morgan*, and their Heirs, shall stand, and be seized of, and in the said Manors, Messuages, Lands, and Premises in *Neather Norton* and *Oversbury Norton* aforesaid; to this further Use, Intent, and Purpose, That from, and after the Decease of my said Daughter *Cecill Fiennes*, without Issue of her Body aforesaid, that over, and besides the Payment of the said former Legacies, and Charges by me hereby given, and devised out of *Neather Norton* and *Oversbury Norton* aforesaid, they the said *Thomas Erle* and *Charles Morgan*, and their Heirs, shall, and will, out of the Rents, Issues, and Profits of the said Manors, Messuages, Lands, and Premises, pay and satisfy the several Gifts, Legacies, and Bequests hereafter mention'd; (that is to say) I give and devise to the said *Mr. Francis Twisleton*, my Godson, and Son to *George Twisleton* of *Yorkshire*, the Sum of Twenty Pounds *per Annum*, for and during the Term of his natural Life; and after his Decease, I give and devise the said Sum of Twenty Pounds *per Annum* aforesaid, to *Mr. Fiennes Twisleton*, for and during the Term of his natural Life. *Item*, I give and devise the Sum of Twenty Pounds *per Annum*, for ever, to be issuing and going out of my said Manors, Messuages, Lands, and Premises, in *Neather Norton* and *Oversbury Norton* aforesaid, to be equally distributed yearly, and every Year for ever, to, and amongst four poor Widows of the said Parish of *Neather Norton* and *Oversbury Norton*, at the Discretion and Nomination of my said Trustees, their Heirs and Assigns. And from, and after, the Decease of my said Daughter *Cecill Fiennes*, without Issue, as aforesaid, I give and devise the said Manors, Messuages, Lands, and Premises, with their, and every of their Appurtenances, to the said *Lady Catherine Jones*, Daughter to the Right Honourable the Earl of *Ranelagh*, in the Kingdom of *Ireland*; *Mrs. Frances Bettenson*, of *Scadbury*, in the County of *Kent*, my said God-daughter; the said *Francis Twisleton*, of the Parish of *Saint James*, in the County of *Middlesex*, Gentleman; and to the said *Elizabeth Hughes*, of *Jewes*, in the County of *Somerset*, severally, and respectively, and to their several and respective Heirs of their respective Bodies, lawfully begotten, or to be



“ be begotten, in Tail General, Share and Share alike, subject nevertheless to the several Annuities, Legacies, and other Payments aforesaid, herein, or thereby, by me charged, given, or devised in, upon, or out of *Neather Norton* and *Oversbury Norton* aforesaid.”

1686. Frances Ellise died. THAT in February, 1686, *Frances Ellise* died, without making any farther Disposition of the said Estate.

1698. Francis Twisleton died. THAT the said *Francis Twisleton*, one of the four Devisees, died in 1698, an Infant, without any Issue, whereby the Reversion in Fee Simple of one fourth Part of the said undivided Moiety, expectant on the Death of the said *Cecill Fiennes*, without Issue of her Body, came to, and was vested in, the said *Cecill Fiennes*, as Daughter, and Heir at Law to the said *Frances Ellise*.

23d July, 1715. *Cecill Fiennes* died. THE 23d July, 1715, the said *Cecill Fiennes* died without Issue, whereby three fourth Parts of the said undivided Moiety of the said Premises, vested in the Respondents the Lady *Catherine Jones*, the said *Frances Bettenson*, then the Wife of *Thomas Hewett*, Esq; afterwards Sir *Thomas Hewett*, Knight, deceased, and now the Respondent the Lady *Hewett*, the said *Elizabeth Hughes*, then the Wife of *Thomas Hawker*, deceased, and Mother of the Respondent *Peter Hawker*; and the remaining fourth Part descended to *Cecill Mignon*, the Niece, and Heir at Law of the said *Frances Ellise*, and also Cousin German, and Heir at Law to the said *Cecill Fiennes*.

Trinity Term, 1716. THE Respondents the Lady *Catherine Jones*, *Thomas Hewett*, Esq; (afterwards Sir *Thomas Hewett*) and *Frances* his Wife, now the Respondent the Lady *Hewett*, *Thomas Hawker*, and *Elizabeth* his Wife, the Father and Mother of the Respondent *Peter Hawker*, levied a Fine, and suffered a common Recovery of three fourth Parts of the said Premises; and by an Indenture, dated the 27th Day of June, 1716, and made between the said *Thomas Erle* (at that Time the surviving Trustee) and the said Lady *Catherine Jones*, *Thomas Hewett*, and *Frances* his Wife, *Thomas Hawker* and *Elizabeth* his Wife, of the first Part, *Thomas Wyberd* of the second Part, and *Anthony Cracherode* of the third Part; the Uses of the said Fine and Recovery, were declared to be, as to one third Part of the said three fourth Parts of the said Moiety, of the said Premises, to the Use of the said Lady *Catherine Jones*, and her Heirs; one other third Part to the Use of the said *Thomas Hewett*, and *Frances* his Wife, and their Heirs; and the other third Part to the Use of the said *Thomas Hawker* and *Elizabeth* his Wife, and their Heirs.

10th March 1721. THAT the Appellant being intituled to the other Moiety of the said Messuages, Lands and Premises, and refusing to join in a Division, or Partition of all the said Premises into equal Moieties, and the Tenants of the said Premises refusing to pay a Moiety of their Rents of the said Premises to the Respondent, the Lady *Catherine Jones*, the said Sir *Thomas Hewett*, and the Respondent Dame *Frances* his Wife, *Thomas Hawker*, who had survived the said *Elizabeth Hawker* his Wife, and *Cecill Mignon*, who were intituled to one Moiety of the said Premises; they the said Respondents, the Lady *Catherine Jones*, the said Sir *Thomas Hewett*, and Dame *Frances* his Wife, the said *Thomas Hawker*, and *Cecill Mignon*, exhibited their Bill in the High Court of Chancery against the Appellant, and the said *Nathan Izod*, *William Clark*, and *William White*, the Tenants of the said Premises, to have a Partition of the said Premises, as against the Appellant, and to compel the said Tenants of the said Premises, to pay a Moiety of their Rents of the said Premises, to the Plaintiffs, in such Bill, from the Death of the said *Cecill Fiennes*.

THAT the said *Thomas Hawker*, and *Cecill Mignon* dying, the said Respondents the Lady *Catherine Jones*, Sir *Thomas Hewett*, and Dame *Frances* his Wife, and *Peter Hawker*, the Son and Heir, and Administrator of the said *Thomas Hawker*, in whom three fourth Parts of a Moiety of the said Premises became vested, exhibited their Bill of Revivor against the Appellant, and the said Tenants of the said Premises; and afterwards amended their said Bill of Revivor, and made the Respondent *Thomas-William Burman*, the Devisee and Executor of the said *Cecill Mignon*, and the Respondent *Fiennes Twisleton*, her Son and Heir, who claimed the other fourth Part of a Moiety of the said Premises, under the said *Cecill Mignon*, Parties to such Bill of Revivor, and the said Suit afterwards revived.

THAT the Appellant and the Tenants of the said Premises, and the said Respondents *Thomas-William Burman*, and *Fiennes Twisleton*, answer'd the said Bills; and the said *Burman*, by his Answer, insisted that he was the Devisee, and Executor of the Last Will and Testament of the said *Cecill Mignon*, and as such was well intituled to one fourth Part of the Moiety in question, and the Rents, from *Cecill Fiennes*'s Death.

THAT the Appellant, by his Answer (*inter alia*) insisted, that the said three fourth Parts of the said Moiety of the said Premises, did not upon the Death of the said *Cecill Fiennes*, without Issue, vest in the Respondents, the Lady *Catherine Jones*, Dame *Frances Hewett*, and *Elizabeth* the late Wife of the said *Thomas Hawker*; but that the whole Moiety of the said Premises upon the Death of the said *Cecill Fiennes* came in Fee Simple to the said *Cecill Mignon*, as Heir to the said *Cecill Fiennes*; and likewise insisted, that the said *Cecill Fiennes* was, by the Limitations in her said Mother's Will, Tenant in Tail of the said Moiety, or of the Trust thereof, or had such Estate, or Interest therein, that by a Fine and Common Recovery, she could dock or bar the same, and all the Remainders thereupon limited by the Will of her said Mother, the said *Francis Ellis*; and further insisted, that the said *Cecill Fiennes* being so seized of a Moiety of the said Premises, she, the said *Cecill Fiennes*, together with her Husband *William Fiennes*, in July 1693, by Deed, Fine and Recovery, duly levied, and suffered, conveyed the said Moiety of the said Premises to the Lord Viscount *Harcourt*, and his Heirs, to and for such Uses as she should, by any Writing under her Hand and Seal, appoint; and further set forth, that in 1695, the said *William Fiennes* purchased the other undivided Moiety of the Premises to him and his Heirs, and dying without Issue in 1699 his Moiety of the said Premises descended upon the Appellant, as his Brother and Heir.

22d March, 1699. THAT by his said Answer, his Lordship further insisted, that upon the Death of the said *William Fiennes*, several Disputes and Differences arising betwixt the said *Cecill Fiennes* his Widow, and his Lordship, touching the real and personal Estate of the said *William Fiennes* for compromising thereof, Articles of Agreement were made and entered into between the said *Cecill Fiennes*, and his Lordship, bearing Date the 22d Day of March 1699; whereby she agreed (*inter alia*) to join in a Sale of the whole Estate at *Norton*, and one Moiety of the Money arising thereby was to be paid to him; and as to the other Moiety, the said *Cecill Fiennes* was to have thereout Five hundred Pounds, and the Interest of the Residue during her Life, with Power to dispose of One Thousand Pounds, the Residue to come to the Appellant.

THAT in Michaelmas Term, 1724, the Appellant exhibited a Cross Bill against the late Lord Viscount *Harcourt*, the Respondents the Lady *Catherine Jones*, Sir *Thomas Hewett*, and Dame *Frances* his Wife, the Respondents *Peter Hawker*, *Thomas-William Burman*, and *Fiennes Twisleton* (*inter alia*) to have a Performance of the said Articles, and a Conveyance of the said *Cecill Fiennes*'s Moiety of the said Premises, to which Bill the Respondents the Lady *Catherine Jones*, Sir *Thomas Hewett*, and *Frances* his Wife, *Peter Hawker*, *Thomas-William Burman*, and *Fiennes Twisleton*, put in their several Answers before the End of June following.

THAT

(3)

THAT the said Original Cause (after the Decease of the said Sir *Thomas Hewett*) being ready for Hearing, the same came on to be heard before the Lord Chancellor, the 26th Day of *June* last past; and the Appellant, and the said Tenants of the Premises, not appearing, tho' they were served with Process to hear Judgment, it was (*inter alia*) ordered and decreed, as between the Respondents the Lady *Catherine Jones*, Dame *Frances Hewett*, *Peter Hawker*, and the Appellant, and the Respondent *Burman*, That a Partition should be made of the Lands into Moieties, and that a Commission should issue for that Purpose; one Moiety whereof was to be allowed to the Appellant, and the other Moiety to be subdivided into four Parts, of which one fourth Part was to be allotted to the Respondent the Lady *Catherine Jones*, and her Heirs; one other fourth Part to the Respondent the Lady *Hewett*, and her Heirs; another fourth Part to the Respondent *Peter Hawker*, and his Heirs; and the other fourth Part to the Respondent *Thomas-William Burman*, and his Heirs, subject to the Annuity of Twenty Pounds *per Annum*, to the Respondent *Fiennes Twisleton* for Life; and Twenty Pounds *per Annum* for a perpetual Charity, mentioned in the Will of the said *Frances Ellise*; and mutual Conveyance were thereby directed to be made by the Parties, for making the Partition effectual, and the said Tenants were to attorn, and pay their Rents according to such Partition; and as to the Costs of the said Partition into Moieties, the Appellant was to pay one Moiety, and the said Respondents the other Moiety thereof; and as to the Subdivision of a Moiety into fourths, the Costs thereof were to be equally paid by the said Respondents. And it was further decreed, that an Account should be taken by a Master from the Death of the said *Cecill Fiennes* (which was d *July*, 1711.) of the Rents and Profits of the Moiety, to which the Plaintiffs in the said Cause, and the said *Burman* were intitled; and that the Appellant should account for such Part thereof as he had received; and the said Tenants *Izod*, *Clarke* and *William White*, were to account for what was due from them; and the Receiver appointed by the Court was to account for what was in his Hands; and the Appellant was to pay the Respondents the Lady *Catherine Jones*, Dame *Frances Hewett* and *Peter Hawker*, their Costs, so far as he had contested their Right and Title to the said Moiety, which Decree was to be binding to the Appellant and the said Tenants, unless good Cause was shewn to the contrary.

THAT the said Appellant, and the said Tenants, who had made Default at the said Hearing of the said Original Cause, applied by Petition, and obtained an Order that the said Original Cause should be set down to be again heard, and the Original Cause, and the said Cross Cause, came on to be heard together before the Lord Chancellor the 16th Day of *November* last past; when it was ordered, that the Order made upon the Hearing of the said Original Cause should be varied, by striking out the Direction for the Appellant's paying the said Plaintiffs in the Original Cause their Costs, so far as he had contested the said Plaintiffs Right and Title to a Moiety of the said Premises. And also a Direction therein as to the Payment of the Costs to the Respondent *Fiennes Twisleton*; and likewise by inserting in that Part of the Order that directs an Account to be taken of the Rents and Profits of the said Moiety, the following Directions, that all just Allowances should be made upon the said Account: But the Variation, as to Costs, was not to extend to the Costs of the Partition of the said Premises into Moieties; and the said Order, made upon Hearing the said Original Cause, with such Variation, was thereby decreed to be absolute; and that the said Cross-bill, brought by the Appellant, should be dismissed out of the said Court, but without Costs.

Objection. FROM this Decree his Lordship hath appealed, and insists that the same ought to be reverted; for that by the Will of the said *Frances Ellise*, the said *Cecill Fiennes* her Daughter was Tenant in Tail of a Moiety of the Premises, or of the Trust thereof; and by the Fine and Recovery in 1693, became seized in Fee, or of such an Estate, or Interest, as she had Power to dispose, and did actually bind by her said Articles with the Appellant; or at least, that the said *Cecill Fiennes*, by the Death of the said *Francis Twisleton*, without Issue, was seized in Fee of his fourth Part, and that the same was bound and affected by the said Articles.

Answers to the Objections. I. THE Respondents humbly insist, that the said Decree is just; for that it appears clearly by the said Will, to have been the Intention of the Testatrix, that the legal Estate, during the Life of the said *Cecill Fiennes*, should remain in the Devisees in Trust, to enable them to pay the Annuities and Legacies thereby given, and to apply the Surplus Profits during her Life for her proper Use, which was the more reasonable, in regard she was then under Coverture. It likewise appears, to have been the Intent of the Testatrix, that after the Death of the said *Cecill Fiennes*, a legal Estate-Tail, should vest in the Heirs of her Body as Purchasers, and not by Descent. And it is apprehended, that the Construction, for which the Appellant contends, is directly contrary to the declared Intent of the Testatrix, by changing the equitable Interest of the said *Cecill Fiennes* in the Surplus Profits for her Life only, into an Estate-Tail. That it is not supported by any Rule of Law, there being no Instance, where a legal Limitation of an Estate to the Heirs of the Body of any Person, hath been united to a prior, equitable Limitation of the Surplus Profits of such Estate to the same Person for Life, so as to make such Person Tenant in Tail by Construction of Law; and that such Construction is highly unreasonable, as it would put it in the Power of the said *Cecill Fiennes*, to defeat her own Issue, if she had had any, and all the subsequent Limitations in the Will.

II. THAT the said *Cecill Fiennes* could not bind the Premises by the said Articles, longer than during her own Life, as to the Three Fourths decreed to the Respondents, the Lady *Catherine Jones*, Dame *Frances Hewett*, and *Peter Hawker*; and if she could (which the Respondents in no wise admit) yet with regard to the said Three Fourths, and likewise with regard to the remaining One Fourth decreed to the Respondent *Thomas-William Burman*, the Respondents humbly insist, that the same, or either of them, are not bound by the said Articles, upon which alone the Appellant's Title depends, for the following

R E A S O N S :

I. FOR that it appears, by the said Articles, That the Occasion of the Appellant's, and the said *Cecill Fiennes*'s entering into the same, was to put an End to the Disputes that had arisen between them, touching the real and personal Estate of the Appellant's Brother, the said *William Fiennes*; and it doth not appear, that there was any Dispute touching the Moiety of the Premises now in question, which was no Part of the Estate of the said *William Fiennes*.

II. IF the said Moiety was intended to be comprised under any general Words in the said Articles; yet such Articles have been long since waved, and departed from; no Demand having been made by the Appellant, upon the Foot of the said Articles, from the 22d of *March*, 1699, the Time they bear Date, to the Death of the said *Cecill Fiennes*, which happened the 23d of *July*, 1715; during all which Time the said *Cecill Fiennes* quietly enjoy'd the said Moiety, subject to the Charges thereon; nor was any Demand made by his Lordship upon the Respondents under the said Articles, till his Lordship mentioned them in his

his Answer to the Original Bill, Twenty-four Years after the Date thereof: And tho' in 1700, Conveyances were made by his Lordship and the said *Cecill Fiennes*, of other Estates; yet such Conveyances neither recite the said Articles, nor import to have been made in pursuance of them; nor are the Limitations or Provisions therein agreeable to the Tenor of the Articles: From whence it is evident, that they were waved, and that the Parties came to a new Agreement.

III. IT would be a dangerous Precedent, if a Court of Equity, at so great a Distance of Time, after the Death of one of the Contracting Parties, who, if living, might be able to prove an express Waiver of the Articles; and after a great Alteration in the Circumstances of Persons and Things, should decree a Specifick Execution of them: And it would be particularly unreasonable in the present Case, in regard that *Cecill Fiennes* being dead, cannot now execute the Power given her by the Articles, of disposing of the Sum of One thousand Pounds; which, in consequence, will give the *Appellant* One thousand Pounds more than was intended for him by the Articles.

FOR which, among other Reasons, these Respondents, the Lady Catherine Jones, Dame Frances Hewett, Peter Hawker, and Thomas-William Burman, humbly insist, That the said Decree is just, and according to the Rules of Equity; and hope, that the same will be affirm'd by your Lordships, and the Appeal dismiss'd with Costs.

C. TALBOT.

N. FAZAKERLEY.

Lawrence, Viscount Say } *Appellant.*
and Seal,

Lady Catherine Jones, Lady }
Hewett, Peter Hawker, } *Respondents.*
Esq; and Thomas-William }
Burman;

The Respondents CASE.

To be heard at the Bar of the House of LORDS,
on Friday—the 28 Day of March 1729.



